

10 AUG 1953

MEMORANDUM TO: Personnel Director

SUBJECT : Employment of Retired Officers as Consultants

1. Reference is made to your memorandum of 12 June 1953 concerning the employment of retired officers of the armed services as consultants with this Agency. The citations referenced in your memorandum (Tab A) were examined in the preparation of this paper together with other applicable decisions.

2. Among the statutes relating to the employment of retired officers as consultants are the following:

a. Section 1765, Revised Statutes, provides that, "No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowances, or compensation."

b. The act of July 31, 1894 states that no person can be appointed to or hold two or more offices when the salary of either or any one of them exceeds the sum of \$2,500, unless specially provided by law. However, retired officers of the Army or Navy elected to public offices or appointed by the President are exempted from the provisions of this law. The amendment of May 31, 1924 further exempts enlisted men of the armed services retired for any cause or officers of the armed services retired for combat or line of duty injuries.

c. The act of May 10, 1916 as amended by the act of August 29, 1916 prohibits payment to a person receiving more than one salary when the combined amounts of such salaries exceed the sum of \$2,000 per annum unless specifically authorized by law. (18 Comp. Gen. 1010)

d. Section 212 of the Economy Act of June 30, 1932 limits the combined rate of compensation which can be received in a civilian position and retired pay for or on account of commissioned service to \$3,000 per annum. However, section 212 provides that, "when the retired pay amounts to or exceeds the rate of \$3,000 per annum, such person shall be entitled to the pay of the civilian office or position or the retired pay, whichever he may elect."

It is provided, however, that the provisions of this section do not apply to officers retired for combat disability.

e. The act of June 26, 1951 (Public Law 53) authorizes the Agency to employ and to pay the compensation of not more than fifteen retired officers while performing service for the Agency, without regard to section 2 of the Act of July 31, 1894, as amended, or any other law prohibiting the employment of retired officers. However, this act states that while so serving such an officer would be entitled to receive the compensation of his position with the Agency, or his retired pay, whichever he may elect.

3. The following citations and decisions of the Comptroller General are relevant to determining whether or not these statutory requirements are applicable to the employment of retired officers as consultants:

a. The Comptroller General stated in 22 Comp. Gen. 312 that section 1765, Revised Statutes, "...does not prohibit a person from holding, and receiving the compensation of, two separate and distinct offices, positions, or employments, the salary or compensation of each of which is fixed by law or regulation, where the two services are not incompatible with each other."

b. With regard to the act of July 31, 1894, as amended, the Comptroller General stated that, "...employment as an expert or a consultant on a 'when actually employed' basis, whether compensation be fixed on a fee basis or a per diem basis, would not be an appointment to an 'office to which compensation is attached', within the meaning of that statute." (23 Comp. Gen. 275, also 63 F 672 and 21 Atty. Gen. 507)

c. Concerning the act of May 10, 1916, as amended, the Comptroller General stated in 15 Comp. Gen. 751 that, "The \$2,000 limitation fixed by the act of May 10, 1916, as amended by the act of August 29, 1916, 39 Stat. 120, 582, is applicable when payment of two salaries covers the same or overlapping periods of service." He continued that if a "...consultant is to be placed on a list of those available to be called for service when needed - payment to be made either on a per diem or fee basis for the particular call - the mere fact of being placed on more than one such list of those available for, and subject to, call under different branches of the Government, would not involve the dual compensation act, supra, and the salary limit therein fixed would not be applicable to prohibit one person from receiving compensation on a per diem or fee basis under more than one part-time or intermittent employment for services performed on different days or at different times." emphasis supplied This statement was re-emphasized in 23 Comp. Gen. 277.

d. From the decisions contained in 13 Comp. Gen. 60, 14 i.d. 68 and 12 i.d. 37, 101, 256 and 448 it appears that though the appointment of retired officers in temporary or intermittent offices would not be prohibited by the act of 1894, as amended, notwithstanding the fact that their retired pay is in excess of \$2,500 per annum, they must elect, for the period of such temporary or intermittent employment, between their retired pay or their per diem, salary, etc.

4. With reference to your memorandum, the position taken by Mr. Moore, Personnel Director of the Office of the Secretary of Defense, on the employment of retired officers on an intermittent, part-time, temporary, or time-limitation appointment appears to be sound, but each case would still have to be reviewed individually to determine the compensation and retired pay aspects of the employment. This function is performed by the General Counsel in this Agency.

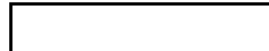
5. The substance of a discussion between the General Counsel, CIA and GAO attorneys regarding the applicability of the dual compensation statutes to the employment of retired officers by this Agency in a consultative capacity is contained in an undated letter from the DCI to the Comptroller General and a memorandum from the General Counsel to the DD/A, dated 25 July 1951. (Tab B) From informal discussions with OGC, it appears that GAO has revisited the subject of consultant employment since the date of the tab B and in consequence would be hesitant in even reaffirming the opinion informally stated therein. It was further indicated that future determinations in this area by GAO would be more stringent than heretofore.

6. The large number of Comptroller General Decisions on the employment of consultants and experts contain many rulings which are at variance. Some of these decisions have been grounded on the basis for which remuneration is granted for the service rendered. Others have been based not on the mode of payment to the individual but on the frequency or duration of employment. There is no one decision which establishes specific criteria or standards for determining whether the employment of an expert or consultant will or will not be in contravention of the dual compensation statutes. This unfortunate state of affairs was pointed out in a memorandum from the Acting General Counsel to the AL/PT/OPC dated 27 August 1951. (Tab C)

7. From the decisions studied, it appears that persons may be employed on a fee basis, a per diem basis, a when actually-employed basis and in positions with a rate of compensation that can not be fixed in advance (because of the infrequency or unpredictability of the service rendered), without contravening the dual compensation statutes. Whether a similar decision would be reached in any other case in which the facts were even only slightly altered is a matter of speculation.

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8. Accordingly, in order to comply with the applicable statutes and decisions insofar as possible, this Agency should apply the intermittent, i.e. when actually employed, principle in its strictest sense. Otherwise, any given case may be subject to an adverse decision by the Comptroller General, at least until the Federal Personnel Counsel, the General Accounting Office and the Bureau of the Budget establish general criteria for the employment of personnel in these categories.



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Attachments

GLC:ku (7 August 1953)

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